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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

*v.*

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statute involved | 2 |
| Question presented | 2 |
| Statement | 3 |
| A. The Board's findings of fact | 3 |
| B. The Board's decision and order | 8 |
| C. The decision of the court of appeals | 10 |
| Argument | 10 |
| It is a violation of the National Labor Relations Act for an employer to discharge an employee for refusing to attend without the presence of her union representative an investigatory interview which she reasonably believes may result in discipline, and to suspend or discharge employee-union representative for acceding to the employee's request | 10 |
| Conclusion | 14 |


## CITATIONS

Cases:


| | |
|---|---|
| *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512 | 10 |
| *Emerson Electric Co.*, 185 NLRB 346 | 13 |
| *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 | 12 |
| *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48 | 10 |

| Cases—Continued | Page |
|---|---|
| *National Labor Relations Board* v. *J. Weingarten, Inc.*, 485 F.2d 1135, certiorari granted, April 29, 1974, No. 73-1363 | 2-3 |
| *Trailmobile Division, Pullman, Inc.* v. *National Labor Relations Board*, 407 F. 2d 1006 | 11 |
| **Statutes:** | |
| National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) | 2 |
| Section 7 | 10-11 |
| Section 8(a)(1) | 8, 11 |
| Section 8(a)(3) | 9 |
| Section 8(a)(5) | 8 |


# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

*v.*

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-71a)[1] is reported at 481 F.2d 1018. The decision

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Union. "A." refers to the separate appendix to the briefs.

and order of the Board (Pet. App. 1a-58a) are reported at 195 NLRB 197.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 72a) was entered on July 19, 1973. On October 5, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to December 17, 1973. The petition was filed on November 12, 1973, and was granted on April 29, 1974 (A. 200). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

## QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge an employee for insisting that her union representative be present at an investigatory interview with the employer which the employee reasonably believes may result in disciplinary action, and to suspend or discharge employee-union representatives for attempting to attend such an interview when asked.[2]

[2] A similar question is presented in *National Labor Relations Board* v. *J. Weingarten, Inc.*, No. 73-1363, certiorari granted, April 29, 1974, which has been set for argument in tandem with the present case.



## STATEMENT

### A. The Board's Findings of Fact

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing at Point Pleasant, West Virginia (Pet. App. 19a). The Company's owners and principal officers are Lawrence Gerlach, Sr., president; his wife, Mary Kathryn Gerlach, production manager; and their son, Lawrence Gerlach, Jr., general manager (Pet. App. 2a; A. 4, 8, 68).

Since 1968, Upper South Department, International Ladies' Garment Workers' Union (the Union) has represented the production and maintenance employees of the Company (Pet. App. 20a). Delila Mulford, an employee of the Company for 12 years, is the Union's chairlady (or steward) who, pursuant to the collective agreement, represents employees in disputes with management (Pet. App. 23a; A. 45, 189).

On the morning of Friday, October 10, 1969, the three Gerlachs met with chairlady Mulford and three other employees, including Catherine King, a long-time Company employee. The employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended in acrimony, with Gerlach, Jr. cursing Mulford and telling her "to get out and if we didn't like the way it was there in the company to go else-

where." (Pet. App. 23a, 59a; A. 46, 53, 57-58, 73, 78.)

Later that day, Mrs. Gerlach saw Catherine King waving her arms and gesturing to the other employees who had been at the meeting. Mrs. Gerlach directed her to resume production, but King told Mrs. Gerlach to "tend to your business." Thereupon, Mrs. Gerlach directed King to go to Mr. Gerlach's office (Pet. App. 2a, 23a; A. 46-47, 73-74). On her way to the office, King asked chairlady Mulford to accompany her. Although Mrs. Gerlach told her that she "had no business down there," Mulford went with King to the anteroom of the office of Gerlach, Sr. (Pet. App. 2a, 23a; A. 47, 74).

There, Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and he didn't have any business with her." When Mulford replied that "Catherine paid her dues and she was entitled [for me] to be there," Mrs. Gerlach warned her that she was "endangering [her] job" (Pet. App. 2a, 23a; A. 47, 82, 92, 126-127, 148). Gerlach, Sr. then ordered King into his office but she refused to go without Mulford (Pet. App. 2a, 23a; A. 74). At that point, Gerlach told King and Mulford to return to their work stations and they obeyed his instruction (Pet. App. 2a, 23a; A. 172-173). On Sunday, October 12, Mrs. Gerlach telephoned Mulford and informed her that she was suspended for two days (Pet. App. 3a, 23a-24a; A. 48).

The following day, King reported for work and found that her timecard was not in the rack, indicating under plant practice that she was wanted in the office. Before going there, she asked Assistant Chairlady Martha Cochran to accompany and represent her. Cochran, who had not yet "punched in" for work, agreed. Outside the office, they met Mrs. Gerlach, who warned Cochran that "your time card is upstairs and my advice to you is to go on upstairs and go to work if you want your job." She added that they only wanted to talk to King and "take up where we left off Friday." Cochran replied, "I'm sorry but if that's what you want to talk to her about that is union business and she asked me to represent her." Cochran added that she was a "union steward and that was my duty." (Pet. App. 3a, 20a-21a, 60a; A. 25-27.)



Cochran and King then spoke to Gerlach, Sr., asking him if he was going to give King her timecard. He told them that "he was not going to give her her timecard until she came into the office and talked to him in private." Cochran stated that King "wants union representation," but Gerlach insisted that "he would only talk to one of [them] at a time." Cochran and King declined to do this and then sat near the office for the rest of the day, waiting for Gerlach to return King's card. In the meantime, Cochran's card, too, was "pulled" from the rack. (*Ibid.*)

The next morning, Tuesday, October 14, Cochran and King again went to the office and asked Gerlach, Sr. if he was going to give King her timecard. He told them he was not going to do so until King "came

into the office and sat down and talked to him in private." Cochran also asked about her own timecard and was told that she had been suspended for two days for being away from her work station. King and Cochran then left the plant. (Pet. App. 3a-4a, 21a; A. 28, 168.)

The next day, Wednesday, Mulford's two-day suspension ended, and she, along with Cochran and King, returned to the office of Gerlach, Sr. to ask for their timecards. Gerlach told Mulford that "he was going to give me my card, but for me to mind my own business." Mulford replied, "I was minding my own business, that Catherine [King] had a right to union representation as well as anybody else * * *." When Mulford inquired as to the status of Cochran and King, she was told "that Martha [Cochran] was suspended yet and that Catherine [King] was wanted in the office without me." Mulford then returned to work, and the other two employees left the plant. (Pet. App. 4a, 24a; A. 28-29, 48-51, 169.)

On Thursday, October 16, Cochran's two-day suspension expired, and, together with Mulford and King, she went to the office of Gerlach, Sr. At the outer office they met Mr. and Mrs. Gerlach, who gave Cochran her timecard and told her to go to work; she complied with these instructions. The Gerlachs then told King that they wanted to see her in the office alone. When she asked, "With Delila [Mulford]?," Gerlach told her, "No, not with Delila." He told King that if "she went out the door that was it,



she was finished." Since King was unwilling to go to the office without Mulford, she left the plant. Mulford then asked if she should go back upstairs to work, to which Gerlach, Sr. replied, "No. You've abandoned your job. You're finished." He told Mulford "to get out," and she left the premises. (Pet. App. 4a, 24a; A. 15-16, 29-30, 51, 170.)

During the lunch hour that day, Cochran went to the office of Gerlach, Jr. to present written grievances on behalf of Mulford, King, and herself. Gerlach, Jr. refused to take the grievances, stating, "I don't have time to fool with them damn things. I'm leaving town." Cochran laid the grievance down on Gerlach's desk but he "grabbed them and threw them in the trash." Gerlach, Jr. then walked into the work area, pulled Cochran's timecard, and said "you worked this morning, but you're not working this afternoon. You're nothing but a damn smart aleck." Cochran went to the office of Gerlach, Sr. and asked if she was fired. Gerlach, Sr. at first equivocated but, when she asked what she should do, he said, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. (Pet. App. 4a, 22a; A. 31-32, 59, 67-68.)

That afternoon, Cochran telephoned the office and requested the secretary of Gerlach, Sr. to ask him if he wanted her to report back to work the next day. She was told that "he said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran has

never been notified to come back to work. (Pet. App. 4a, 22a; A. 33, 135.)

### B. The Board's Decision and Order

The Board (with one Member dissenting) held that the Company violated Section 8(a)(1) of the Act by discharging King for refusing, on October 16, 1969, to attend the interview with Gerlach, Sr. without the presence of her union representative, and by suspending Cochran and suspending and discharging Mulford "for performing their duties as union chairladies in seeking to represent King" (Pet. App. 7a-8a). The Board found that King "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (Pet. App. 7a). The Board concluded that, where such reasonable belief exists, "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (Pet. App. 6a).

The Board noted that, "while the employer's denial of such a request may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (Pet. App. 6a). The Board concluded that either of these em-



ployer actions would violate the Act. The Board explained that, under its ruling, the employer need not accede to the request for representation, but could not force the employee to attend unassisted. "Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is offered the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview" (footnote omitted). (Pet. App. 6a-7a.)

Finally, the Board unanimously held that the Company violated Section 8(a)(3) and (1) of the Act by discharging Cochran because of her attempt to file grievances with Gerlach, Jr. on behalf of herself, Mulford, and King (Pet. App. 9a).

The Board ordered the Company, *inter alia*, to cease and desist from "[r]equiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action." The order also required the Company to offer reinstatement with backpay to King, Mulford, and Cochran (Pet. App. 10a, 55a).

### C. The Decision of the Court of Appeals

The court of appeals enforced that part of the Board's order pertaining to the discharge of Cochran because of her attempt to file grievances (Pet. App. 62a).[3] But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at the requested meetings with her employer * * *" (Pet. App. 62a). Relying on its reading of prior precedent (Pet. App. 63a-67a), the court concluded that "the management prerogative of conducting an investigatory interview such as Quality attempted here * * * [is not] a violation of the Act" (Pet. App. 71a).

## ARGUMENT

### IT IS A VIOLATION OF THE NATIONAL LABOR RELATIONS ACT FOR AN EMPLOYER TO DISCHARGE AN EMPLOYEE FOR REFUSING TO ATTEND WITHOUT THE PRESENCE OF HER UNION REPRESENTATIVE AN INVESTIGATORY INTERVIEW WHICH SHE REASONABLY BELIEVES MAY RESULT IN DISCIPLINE, AND TO SUSPEND OR DISCHARGE EMPLOYEE-UNION REPRESENTATIVES FOR ACCEDING TO THE EMPLOYEE'S REQUEST

In its brief in *National Labor Relations Board* v. *J. Weingarten, Inc.*, No. 73-1363, the Board has fully set forth its reasons for believing that Section

[3] The Company has not cross-petitioned for a writ of certiorari and that aspect of the court of appeals' decision is not open to review here. *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4.



7 of the Act gives an employee the right to union representation at an investigatory interview with the employer which the employee reasonably believes may result in discipline against him, and that an employer therefore violates Section 8(a)(1) by requiring the employee to participate in the interview without such representation. We shall not repeat those reasons here, but refer the Court to our brief in *Weingarten*.[4] If the Board's position in *Weingarten* is sustained, it follows that an employer could not discharge an employee for refusing to attend such an interview unassisted by his union representative, or suspend or discharge employee-union representatives for acceding to the employee's request. See *Trailmobile Division, Pullman, Inc.* v. *National Labor Relations Board*, 407 F.2d 1006, 1008-1009 (C.A. 5). Accordingly, this brief is confined to showing that the record supports the Board's factual findings.

1. As shown in the Statement (*supra*, pp. 3-4), on the morning of October 10, 1969, King, several other employees, and chairlady Mulford had a meeting with the three Gerlachs concerning the employees' dissatisfaction with their earnings under the piece rates then in force. The meeting had been "acrimonious," and, during it, Gerlach, Jr. had told chairlady Mulford that if the grievants "did not like the way it was there in the company to go elsewhere." Later that day, Mrs. Gerlach saw King creating a disturbance by gesturing to the other employees involved

[4] We are serving copies of that brief on counsel for the other parties to the present case.

in the morning grievance session. Mrs. Gerlach testified that when she told King to get back to work, King "sassed me" (A. 74). Thereupon, Mrs. Gerlach insisted that King go to the office of Gerlach, Sr. with her because she "wanted [her] husband to correct King for this sassing [of her]" (A. 79). In such circumstances, King could reasonably have believed that discipline could result from the interview with Gerlach, Sr.[5]

On October 16, Gerlach, Sr. discharged King for insisting on union representation. Thus, Gerlach insisted on seeing King alone, refused her request to be accompanied by Mulford, and added that, if King "went out the door that was it, she was finished"; King thereupon left the plant (A. 51; *supra*, pp. 6-7).[6]

2. The facts summarized in the Statement (*supra*, pp. 4-7) also fully support the Board's findings that Cochran and Mulford were suspended, and Mulford discharged, for attempting, in their capacities

[5] King did not testify at the Board hearing since she had recently undergone serious brain surgery (Pet. App. 45a; A. 23-24). As the Board stated in its decision here (Pet. App. 6a, n. 3): "'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." Accordingly, the subjective state of mind of the employee involved is irrelevant. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608.

[6] As the Trial Examiner, whose finding was adopted by the Board (Pet. App. 7a, n. 5), found (Pet. App. 46a): "Since King was still on suspension at the time she could not report to work, and thus was compelled to go out the door when she decided not to speak to Gerlach alone. This constitutes a discharge of King."



as union representatives, to attend Gerlach's interview with King at King's request. On Sunday, October 12, after trying to represent King on October 10, Mulford was suspended for two days. Similarly, on October 14, the day after she had tried to represent King, Cochran was suspended for two days. On October 16, after King had been discharged for again insisting upon representation by Mulford, Gerlach, Sr. told Mulford also "to get out" because she was "finished" (A. 51).[7]

[7] The Board rejected as pretextual the Company's contention that Cochran and Mulford were disciplined for leaving the floor without permission, rather than for their attempts to accede to King's request, pointing out that union chairladies had left the floor on union business in the past without permission (Pet. App. 8a). Cf. *Emerson Electric Co.*, 185 NLRB 346, which the Board distinguished (Pet. App. 8a, n. 7).

## CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies enforcement of the Board's order, and the case should be remanded to that court with directions to enforce the Board's order in full.

Respectfully submitted.

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